# Johore Mining and Stevedoring Co Sdn Bhd v Lau Yau Chai & Anor

HIGH COURT (KUALA LUMPUR) — ORIGINATING MOTION NO R1-25-122 OF 1999

RAUS SHARIF J

4 DECEMBER 2003

*Adminstrative Law — Remedies — Certiorari — Application to quash decision of Industrial Court — Whether court erred in law and acted in excess of jurisdiction — Whether decision to be quashed*

*Labour Law — Employment — Definition of 'workman' — Whether employee's post as CEO distinct from role as managing director — Whether employee employed under contract of employment as CEO — Whether applicant committed fundamental breach of contract*

The first respondent, at the material time, worked for the applicant company as its managing director, and subsequently as Chief Executive Officer ('CEO'). The applicant's major shareholders had been a Canadian establishment who later sold their shares to a Malaysian company. Subsequently, the applicant's board of directors appointed another as the Executive Deputy Chairman/Chief Executive Officer and abolished the post of the managing director. The first respondent considered himself dismissed when informed of this by the applicant. The matter went before the Industrial Court ('IC') which decided that the first respondent had been unfairly dismissed. This was the applicant's application for a certiorari to quash that decision on the premise that the IC had erred in law and acted in excess of jurisdiction when it premised its decision on that fact that the first respondent was employed as the CEO, and not managing director, at the material time.

**Held**, dismissing the application:

(1) The IC had found as a fact that there was indeed a contract of employment entered into between the first respondent and the applicant as CEO, distinct from his position as managing director (see para 13).

(2) The IC had correctly taken into account relevant considerations that the first respondent had entered into a contract of employment with the applicant whereby he wore ' two hats', that is, the Managing Director and CEO. The mere fact that someone is a director of a company is no impediment to his entering into a contract to serve the company (see para 14).

(3) The applicant was in breach of its contract with the first respondent by no longer wanting to honour its part of the contract and the first respondent was justified in considering himself as dismissed (see para 16).

**[Bahasa Malaysia summary**

Responden pertama, pada masa berkenaan, bekerja untuk pemohon sebagai pengarah pengurusan, dan seterusnya ketua pengarah eksekutif ('KPE'). Pemegang-pemegang saham besar pemohon sebelum ini adalah suatu syarikat Kanada yang kemudiannya telah menjualkan saham mereka kepada satu syarikat Malaysia. Seterusnya, lembaga pengarah telah melantik orang lain sebagai timbalan pengerusi eksekutif/ketua pengarah eksekutif dan telah membubarkan jawatan pengarah pengurusan. Responden pertama menganggap dirinya sebagai ditamatkan pekerjaan bila hal ini dimaklumkan oleh pemohon. Perkara ini dihadapkan ke Mahkamah Perusahaan ('MP') yang memutuskan bahawa responden pertama telah dibuang kerja secara tidak adil. Ini adalah permohonan pemohon untuk perintah certiorari membatalkan keputusan tersebut atas alasan MP telah khilaf di sisi undang-undang dan berlaku di luar bidang kuasa bila ia membuat keputusan tersebut di atas fakta bahawa responden pertama telah bekerja sebagai KPE dan bukan sebagai pengarah pengurusan pada masa berkenaan.

**Diputuskan**, menolak permohonan:

(1) Mahkamah Perusahaan telah mendapati wujudnya fakta bahawa terdapat kontrak perkhidmatan yang dibuat antara responden pertama dan pemohon sebagai KPE, yang berlainan daripada jawatannya sebagai pengarah pengurusan (lihat perenggan 13).

(2) Mahkamah Perusahaan dengan betulnya telah mengambil kira pertimbangan yang relevan iaitu responden pertama telah membuat perjanjian perkhidmatan dengan pemohon di mana dia memegang dua watak, iaitu sebagai pengarah pengurusan dan KPE. Fakta bahawa seseorang itu merupakan pengarah sesuatu syarikat bukanlah penghalang untuk memasuki suatu perjanjian berkhidmat untuk syarikat (lihat perenggan 14).

(3) Pemohon telah melanggar kontraknya dengan responden pertama dengan keengganannya untuk menghormati bahagian kontraknya dan responden pertama mempunyai justifikasi untuk menganggap dirinya sebagai diberhentikan (lihat perenggan 16).

**Notes**

For cases on certiorari generally, see 1 *Mallal's Digest* (4th Ed, 2002 Reissue) paras 185–393

For cases on definition of 'workman', see 8(1) *Mallal's Digest* (4th Ed, 2003 Reissue) para 842

**Cases referred to**

*Catherine Lee v Lee's Air Farming Ltd* [1961] AC 12 (refd)
*Lau Yau Chai v Johore Mining & Stevedoring C Sdn Bhd* [1997] 1 MLJ 776 (refd)
*Schindler v Northern Raincoat Co Ltd* [1966] WCR 1038 (folld)

**Legislation referred to**

Industrial Relations Act 1967 s 20(1)

*Raymond TC Low (Shearn Delamore & Co) for the applicant*
*LG Seah (Lobo & Associates) for the respondent*

**Raus Sharif J:**

**[1]** This is an application by the applicant for, inter alia, an order of certiorari to quash the decision of the Industrial Court in Award No 556 of 1999 dated 23 October 1999. The Industrial Court held that the dismissal of the first respondent was without just cause or excuse and awarded the first respondent compensation totalling RM682,500, less the necessary statutory deductions.

**[2]** The brief facts leading to this application are as follows:

**[3]** The first respondent joined the applicant on 20 April, 1997 as a Corporate Assistant. He was later appointed as a General Manager vide letter dated 21 May, 1980. Subsequently, he was made the Deputy Managing Director before he was appointed the Managing Director starting from July 1983.

**[4]** Aluminium Company of Canada (ALCAN) was the majority shareholder of the applicant. The first respondent was treated as a Malaysian employee and pursuant to that he was paid a salary and annual bonus and was also given an annual increment. He was also paid a performance payment in 1991.

**[5]** Alcan's shares were later sold to a Malaysian company. As the majority of the shareholders were new, the first respondent submitted a letter dated 14 April, 1992 to the Management Committee enclosing a draft to formalise his terms and condition of services, which he already enjoyed and requested the matter be discussed at the next Management Committee meeting. At the time he sent the letter he was the Chief Executive Officer ('CEO') of the applicant and his basic salary was RM17,500.00 per month.

**[6]** The first respondent did not get a reply to his letter dated 14 April, 1992. Thus, he again wrote to the applicant on the matter on 4 May, 1992. However, there was no response.

**[7]** Then came the eventful day of 12 May 1992. On that day at 9.30 am the Board of Directors of the applicant held its 72nd meeting. Thereafter, at 12.30 pm, the Annual General Meeting was held. At the said meeting, the first respondent was not re-elected as a director of the applicant. At 1.30 pm, the Board of Directors of the applicant held its 73rd meeting. At that meeting Encik Hashim bin Othman was appointed as Executive Deputy Chairman/ Chief Executive Officer of the applicant. The post of the Managing Director was abolished. At 3.56 pm, the first respondent received a letter from the applicant informing him, among other things, that he ceased to be the Managing Director of the company since he was not elected as a director at the Annual General Meeting and the Board of Directors at its meeting had decided to abolish the post of Managing Director

**[8]** The first respondent considered himself as dismissed by the applicant. He subsequently filed his representations under s 20(1) of the Industrial Relations Act 1967 ('the Act') to the Director General of Industrial Relations. The said representations were not settled and the matter was therefore, referred to the Industrial Court to be adjudicated.

**[9]** In the Industrial Court, the applicant raised a preliminary objection, contending that the first respondent is not a 'workman' under a contract of employment. The Industrial Court upheld this preliminary objection vide Award No 374 of 1994 and thereby dismissed the first respondent's claim.

**[10]** The first respondent thereafter applied to the High Court vide Originating Motion No R1-25-101-94 to quash the award but was unsuccessful. (*See Lau Yau Chai v Johore Mining & Stevedoring C Sdn Bhd* [1997] 1 MLJ 776). The first respondent appealed to the Court of Appeal and the Court of Appeal allowed the appeal and reversed the said High Court's decision. The Court of Appeal quashed the said award and remitted the case to the Industrial Court on the merits.

**[11]** Pursuant to the order of the Court of Appeal, the Industrial Court heard the case and decided in favour of the first respondent.

**[12]** In its statement pursuant to order 53, the applicant has contended that the Industrial Court had erred in law and/or acted in excess of its jurisdiction when it held that at the material time in question, the first respondent had been employed as the CEO separate from the post of Managing Director. It is the applicant's contention that the Industrial Court in ruling that the first respondent was at the material time employed as the CEO and not Managing Director had erred in law and acted in excess of jurisdiction in that:

i) it failed to take relevant matters with consideration;

ii) it took irrelevant matters into consideration;

iii) it misconstrued the provisions of the applicant's statement in reply; and

iv) it reached a decision that was so perverse and devoid of plausible justification that no reasonable tribunal similarly circumstanced would have reached it.

**[13]** It is clear that the applicant's entire case is based on its contention that the first respondent was the Managing Director and not a CEO. With respect, I am unable to agree. The Industrial Court had found as a fact that there was indeed a contract of employment entered into between the first respondent and the applicant as CEO, distinct from his position as Managing Director. In reaching its decision, the Industrial Court had taken the following, inter alia, into consideration which is apparent from the Award:

a) the career history of the first respondent;

b) the circumstances leading to the appointment of the first respondent as the Managing Director;

c) the undisputed fact that the first respondent was an employee of the applicant at all material times;

d) the fact that the first respondent was earlier employed as a Corporate Assistant and had also been appointed as a Director as far back as 24 April 1980;

e) the fact that the first respondent had gained promotion to various positions since 1977 and then was later promoted to become Managing Director, but yet remained as employee of the applicant;

f) that the only person who knew about the first respondent's job was one Caryll Birkett, the author of the letter promoting the first respondent as Managing Director, but he was not called by the applicant to testify;

g) that the applicant's only witness had admitted that it was for the job of CEO that the first respondent was paid a salary and EPF contribution;

h) that the new post of Executive Deputy Chairman/CEO was subsequently created soon after the first respondent was not elected as a director and the post of Managing Director was abolished. This contradicts the applicant company's contention that the post of Managing Director was also known as CEO.

**[14]** Thus, I am of the view that the Industrial Court had correctly taken into account the aforesaid relevant considerations that the first respondent had entered into a contract of employment with the applicant whereby he wore 'two hats', that is, the Managing Director and CEO. Indeed, it is a well established that the mere fact that someone is a director of a company,is no impediment to his entering into a contract to serve the company. See *Catherine Lee v Lee's Air Farming Ltd* [1961] AC 12.

**[15]** The said principle is also echoed in the case of *Schindler v Northern Raincoat Co Ltd* [1966] WCR 1038**.** The facts in Schindler's case are on all fours with our present case. In that case the plaintiff was to enter a ten year service agreement as managing director with the defendant. Subsequently, however, the defendant's company had sold its share capital to another third party who did not want to retain the plaintiff's services. At an extraordinary general meeting of the defendant, the plaintiff was removed from office as a director. The court held that:

> ... there was an implied term in the plaintiff's agreement that the defendant's company would do nothing of its own motion to put an end to the state of the circumstances which enabled the plaintiff to continue as managing director and accordingly, the defendant's company was in breach of its contact with the plaintiff.

**[16]** Appling the above principle, I am of the view that the applicant in our present case was likewise in breach of its contract with the first respondent. The Industrial Court had correctly concluded that the applicant no longer

wanted to honour its part of the contract and the first respondent was justified in considering himself as dismissed. Thus the contention of the applicant that the Industrial Court had failed to take relevant matters into consideration but took irrelevant matters into consideration is devoid of any merit.

**[17]** I am also of the view that the Industrial Court did not misconstrue any of the parties pleadings as contended by the applicant. The learned Chairman had clearly addressed on the pleadings, the key issues of the Award before making his decision. Looking at the Award, the learned Chairman had examined with the utmost care, the pleadings and the evidence adduced. I have no reason to interfere with the Award.

**[18]** In conclusion, on the facts of this case, I am unable to hold that the Industrial Court has reached a decision that was so perverse and devoid of plausible justification that no reasonable tribunal similarly circumstanced would have reached it. Accordingly, the applicant's application is dismissed with costs.

*Applicant's application dismissed with costs.*

Reported by AG Kalidas